STATE OF MICHIGAN

COURT OF APPEALS

YOUR HOME TOWN USA, INC., Plaintiff-Appellant,	UNPUBLISHED March 15, 2007
v	No. 273136 Jackson Circuit Court
CREATIVE GRAPHICS, INC., and RANDEY BATER, Defendants-Appellees.	LC No. 05-006346-CZ

Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court order granting summary disposition to defendants pursuant to MCR 2.116(C)(10) in this case alleging violation of a confidentiality/non-compete agreement, intentional interference with contractual relations and civil conspiracy. We affirm.

Plaintiff Your Home Town USA, Inc., employed defendant Randey Bater as a salesperson of advertising for placemats, tourist publications and printer publications for 13 ½ years, from approximately March 1991 until August 2004. While employed by plaintiff, defendant Bater signed an agreement entitled "Confidentiality/Non Compete Agreement" on October 8, 1997, which provided:

> (1) In consideration of my employment and/or subcontracting for Your Home Town USA, Inc (which, together with any related business entities such as PlateMate, Michigan Tourist Monthly, Chirographics, Spirit of the Lakes, TeleMate and any other DBA held by Your Home Town, USA, Inc., is called "the Company"), and of the wages and or commissions paid for my services:
>
> > (a) I agree not to use or disclose (except as my Company duties may require) any of the Company's confidential information (whether or not conceived, originated, discovered or developed by me) unless the Company consents in writing. I understand that this obligation remains with me indefinitely, even after my employment and/or subcontracting within the Company ends.
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> (2) I understand that "Confidential Information" means information or material:

(a) which is not generally available, available to or used by others, or

(b) the utility or value of which is not generally known or recognized as a standard practice, whether the underlying details are in the public domain or not.

(3) I understand that confidential information includes:

(a) information or materials which relate to the Company's inventions, technological developments, graphics, "know-how", purchasing, accounting, merchandising, licensing or clients.

(b) trade secrets as defied [sic] in the Restatement of Torts which I accept as an appropriate statement of law.

(c) any information of the type described above which the Company obtained from another party and which the Company treats as proprietary or designates as confidential whether or not owned or developed by the Company.

(4) I agree to deliver to the Company, on the date my employment and/or subcontracting ends (or promptly upon request), all documents and items (or things) in my possession pertaining to the business of the Company, including, but not limited to, confidential information. If documents and items (or things) pertaining to the business of the Company or originating with the Company come into my possession after my employment ends, I will promptly deliver them to the Company.

(5) I represent that I have no agreements with or obligations to others concerning any developments of confidential information. Nor, do I have any agreements or obligations that might conflict with this agreement.

(6) I understand that this agreement constitutes the complete understanding between the Company and me on the subject matter of this agreement and that this agreement supersedes all prior representations and understandings, whether oral or written.

(7) I agree that my obligations under this agreement are binding on my heirs, executors, administrators or legal representatives or assigns, and that this agreement inures to the benefit of the Company, its successors and assigns.

(8) I understand that the Company's rights and obligations under this agreement may not be changed, modified, released, discharged, abandoned or otherwise terminated, in whole or in part, except in writing, signed by an authorized Officer of the Company.

(9) When this agreement ends, I will, if requested by the Company, reaffirm the obligations described in paragraph 1 of the agreement, including my

> understanding of the importance of keeping the Company's confidential information confidential.
>
> I understand that violating the terms of this agreement can result in civil and/or criminal prosecution.

Defendant Creative Graphics, Inc., hired defendant Bater in February 2005. Defendant Creative Graphics is in the business of advertising sales and commercial printing services.

Plaintiff filed suit against defendants, seeking to enforce the confidentiality/non-compete agreement. Plaintiff's complaint also sought damages from defendant Creative Graphics for intentional interference with contractual relations, and alleged civil conspiracy as to both defendants.

Defendants filed a motion for summary disposition, asserting that the confidentiality/non-compete agreement was unenforceable as a matter of law under the Michigan Antitrust Reform Act (MARA), MCL 445.771 *et seq.*, and that, even if it were enforceable, plaintiff failed to create a trial question as to whether defendant Bater breached the agreement. The circuit court concluded that the agreement was not a valid non-competition agreement because it lacked essential terms, including geographic scope, time limitation, and scope of competition. The circuit court granted summary disposition on the non-competition count, but allowed plaintiff additional briefing on the confidentiality aspect of the agreement, interference with contractual relations and civil conspiracy claims. After plaintiff filed a supplemental response, the circuit court dismissed the remaining claims, concluding that

> In general, the place mats before Mr. Bater was hired had fewer ads from current and former of Plaintiff's clients than the ads after Mr. Bater was hired. This is interesting but does not create an issue of fact as to whether Mr. Bater used confidential information. The names of place mat advertisers are not confidential information. It is generally available to anyone who goes into a restaurant. Plaintiff may have additional confidential information about those clients, but there has been no showing that Randey Bater and Creative Graphics in any way used that information. No advertiser has signed an affidavit regarding what Mr. Bater did or did not do in soliciting their work. Mr. Bater could have simply announced that he had a new employer and they may have been willing to use his services.
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> * * *
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> Since I find that there is no material issue of fact as to the breach of the agreement, I also find that there is no material issue of fact as to any civil conspiracy. Defendants' Motion for Summary Disposition is GRANTED in total.

This appeal ensued.

I

Plaintiff asserts that the "confidentiality/non-compete agreement" represents an enforceable non-compete agreement. The gist of plaintiff's argument, however, is that "even if the court finds that the non-competition agreement is unreasonable for any particular reason, it is not compelled to reject it as being unenforceable. The court has the discretion to modify the agreement and enforce it as modified."

Section 4a of the MARA, MCL 445.774a, provides:

> Sec. 4a (1) An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.
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> (2) This section shall apply to covenants and agreements which are entered into after March 29, 1985.

MCL 455.774a(1) "explicitly permits reasonable noncompetition agreements between employers and employees." *Bristol Window and Door, Inc v Hoogenstyn,* 250 Mich App 478, 494; 650 NW2d 670 (2002). "Michigan law requires that an employee's covenant not to compete after termination of employment be 'reasonable as to its duration, geographical area, and the type of employment or line of business.'" *Frontier Corp v Telco Communications Group, Inc,* 965 F Supp 1200, 1208 (SD IN, 1997) (applying Michigan law, MCL 445.774a[1]).

We conclude that the agreement is not an enforceable non-competition agreement because, other than its title, it contains *no language* relative to non-competition, and none of the terms required under the MARA. *Id.* The cases plaintiff cites are distinguishable, as each involved more fully drafted non-competition or confidentiality agreements involving either interpretation of the geographical scope restriction alone, or the geographical, time period and scope of work restrictions. See *Frontier Corp, supra* at 1208 (applying Michigan law, MCL 445.774a(1), concluding that one year duration of agreement was reasonable; that prohibition on soliciting *any of* Frontier Airlines' customers and absence of geographic limit were unreasonable, and court modified such to apply only to customers that former employee had successfully solicited on behalf of former employer); *Superior Consulting Co, Inc v Walling,* 851 F Supp 839, 847 (ED MI, 1994) (applying Michigan law, MCL 445.774a, concluding that six month period of non-competition agreement was reasonable; agreement was reasonable as to line of work restrictions, restricting application to healthcare information systems consulting businesses; unlimited geographic scope was not unreasonable given that employer did business in forty three states and several foreign nations; and, although agreement did not restrict type of work to which it applied, court modified agreement to apply only to actual consulting and management work for competitors, and only in competitors' healthcare information systems consulting businesses, and held agreement as modified reasonable); *Robert Half Int'l, Inc v Van Steenis,* 784 F Supp 1263, 1273-1274 (ED MI, 1991) (noncompetition agreement's one year period found reasonable, agreement's applicability to fifty-mile radius from employer's Ann

Arbor, Southfield and Troy offices found reasonable as to Southfield and Troy, but not Ann Arbor, since former employee did not operate permanent employment agency from that office, which is the type of business restricted by noncompetition agreement).[1]

The circuit court reasoned, and we agree, that it would take a wholesale rewriting of the agreement, rather than modification, to make it an enforceable non-competition agreement. The circuit court thus did not abuse its discretion by declining to modify the agreement and the non-competition claim was properly dismissed.

The fact that defendant Bater testified at deposition that he understood the agreement and that his understanding was that he was to abstain from any business in advertising in any form throughout the State of Michigan for life does not alter our conclusion, as the agreement states no such terms regarding non-competition.

II

Plaintiff asserts that specific facts exist that create a jury issue whether defendant Bater breached the confidentiality provisions of the agreement. Plaintiff asserts that during the twenty-one days the circuit court allowed it for supplemental briefing on the issue whether defendant Bater breached the confidentiality provisions of the confidentiality/non-compete agreement, plaintiff viewed all the placements that defendant Bater worked on during his employment with defendant Creative Graphics, and that the placemats "showed an increase both in numerical number of ads appearing on each placemat, as well as in the percentage of YHT [plaintiff's] clients appearing on each placemat." Plaintiff asserts that before defendant Bater worked on Creative Graphics placemats 22.7% of the advertisers were plaintiff's clients, whereas after Bater worked for Creative Graphics, the number was 58.39%. Plaintiff maintains that "[t]he clear suggestion is that Randey Bater used the *confidential* client list" of plaintiff to get the increase in Creative Graphics' clients, thus the issue was for the jury whether Bater breached the agreement to not use plaintiff's confidential information.

Plaintiff submitted below three placemats defendant Creative Graphics produced before it employed defendant Bater and approximately twenty-five placemats it produced while employing Bater. Plaintiff also submitted a client list labeled "Confidential" across each page, and an affidavit of its co-general manager, Kathy Jean-Kirvan Cox. The affidavit stated that defendant Bater had access to the confidential client list, which listed plaintiff's clients that purchased advertising space on placemats in Jackson, Hillsdale, Lenawee and Berrien counties.

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[1] Plaintiff also cites an unpublished opinion of this Court, *Comtech Int'l Design Group, Inc v Price*, unpublished opinion per curiam of the Court of Appeals (Docket No. 245144, issued 5/27/03), in which a panel of this Court concluded that geographic scope restriction of the agreement to within fifty miles of any office or area former employee had been assigned to, was unreasonable, and modified agreement's geographic scope to Michigan alone). This unpublished case is distinguishable from the instant case as well, as the noncompetition agreement contained a geographical scope provision whereas the instant case's agreement does not.

The circuit court considered this evidence and concluded it was insufficient to raise an issue of fact whether defendant Bater violated the confidentiality provisions of the agreement:

> The Plaintiff's Supplemental Response contrasts three placemats produced before Randy [sic] Bater was hired with 25 placemats produced after he was hired. Each placemat has 14-26 ads. In general, the placemats before Mr. Bater was hired had fewer ads from current and former of Plaintiff's clients than the ads after Mr. Bater was hired. This is interesting but does not create an issue of fact as to whether Mr. Bater used confidential information. The names of placemat advertisers are not confidential information. It is generally available to anyone who goes into a restaurant. Plaintiff may have additional confidential information about these clients, but there has been no showing that Randey Bater and Creative Graphics in any way used that information. No advertiser has signed an affidavit regarding what Mr. Bater did or did not do in soliciting their work. Mr. Bater could have simply announced that he had a new employer and they may have been willing to use his services.
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> If the agreement is interpreted that Mr. Bater is prevented from using any information, then the confidentiality agreement almost becomes the same as a non-compete agreement. But this agreement does not prohibit Mr. Bater from using any information that he may have learned in his employment, it only prohibits him from using confidential information, and there is simply no showing in the affidavit that he used confidential information.
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> I find that Plaintiff has not created a material issue of fact and that the Defendants are entitled to Summary Disposition on all counts . . . .

We agree with the circuit court that plaintiff failed to present evidence sufficient to raise an issue of fact whether defendant Bater breached the confidentiality provisions of the Confidentiality/Non-compete agreement, as there was no showing that plaintiff used confidential information. Although the client list plaintiff submitted below was labeled "Confidential," plaintiff does not challenge the circuit court's finding that the "names of placemat advertisers are not confidential information," and are "generally available to anyone who goes into a restaurant." Nor does plaintiff cite any authority in support of its argument.

III

Plaintiff contends that specific facts exist that create a jury issue whether defendant Creative Graphics intentionally interfered with the agreement defendant Bater signed, in that Creative Graphics knew of the agreement, but nonetheless hired defendant Bater to sell advertising to the same client base as he did for plaintiff. We disagree.

A claim of intentional interference with contractual relations is established by showing that there was some intentional, improper interference with a contractual relationship. *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n,* 257 Mich App 365, 383; 670 NW2d 569 (2003), aff'd 472 Mich 91; 693 NW2d 358 (2005). The improper interference may be shown by either proving 1) the intentional doing of an act wrongful per se, or 2) the intentional doing of a

lawful act with malice and unjustified in law for the purpose of invading contractual rights or relationship. *Id.*

Gary Bailey, President of Creative Graphics, testified that he hired defendant Bater well after Bater had left plaintiff's employ. Bailey testified that Bater showed him the non-compete agreement, and he (Bailey) showed the agreement to an attorney, who reviewed the agreement in a five-minute consultation and opined that the agreement was "a joke." Bailey testified that Creative Graphics had been in the business of placemat advertising for approximately thirty years when he hired defendant Bater.

Plaintiff asserts that Creative Graphics' knowledge of the confidentiality/non-compete agreement and defendant Bater's deposition testimony that he "understood the agreement to prohibit him from print advertising sales in the state of Michigan," is sufficient to raise an issue of fact whether Creative Graphics intentionally interfered with the non-compete agreement Bater signed while employed by plaintiff.

We conclude that the circuit court properly dismissed the intentional interference with contractual relations claim. Although defendant Bater testified that his understanding of the agreement was that he was to abstain from any business in advertising in any form throughout the State of Michigan, the agreement nowhere states any such restrictions. Since the agreement does not restrict the scope of employment, geographical area, or time frame relative to future employment, defendant Creative Graphics, which reviewed the agreement, was free to hire defendant Bater. Further, plaintiff made no showing that defendant Creative Graphics encouraged defendant Bater to disclose or use confidential information. The record is devoid of evidence of interference by Creative Graphics of defendant Bater's relationship with plaintiff. Thus, plaintiff's intentional interference with contractual relations claim was properly dismissed.

Finally, we reject plaintiff's claim that it presented sufficient evidence to raise a jury issue whether defendants engaged in a civil conspiracy. A civil conspiracy is established by showing "concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Admiral Ins Co v Columbia Casualty Ins Co,* 194 Mich App 300, 313; 486 NW2d 351 (1992). A civil conspiracy claim cannot exist standing alone—it is necessary to prove a separate, actionable tort. *Early Detection Ctr, PC v New York Life Ins Co,* 157 Mich App 618, 632; 403 NW2d 830 (1986). Because plaintiff failed to set forth sufficient evidence to create genuine issues of fact regarding breach of the confidentiality/non-compete agreement and intentional interference with contractual relations, its civil conspiracy claim must fail.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Helene N. White
/s/ Stephen L. Borrello